STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KEVEN JOSEPH MARKLE,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JOLEEN GREEN,

Respondent-Appellant,

and

KEVEN MARKLE,

Respondent.

UNPUBLISHED
September 15, 2009

No. 291397
Hillsdale Circuit Court
Family Division
LC No. 07-000802-NA

In the Matter of KEVEN JOSEPH MARKLE,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KEVEN MARKLE,

Respondent-Appellant,

and

JOLEEN GREEN,

Respondent.

No. 291462
Hillsdale Circuit Court
Family Division
LC No. 07-00802-NA

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

In these consolidated appeals, respondent Joleen Green (hereinafter "respondent-mother") and respondent Keven Markle (hereinafter "respondent-father") each appeal as of right from the order terminating their parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). The court also terminated respondent-mother's parental rights pursuant to MCL 712A.19b(3)(m). We affirm.

I. Jury Waiver

We first address respondent-father's argument in Docket No. 291462 that the trial court erred in exercising jurisdiction over the minor child pursuant to his plea of admission. Respondent-father maintains that he did not knowingly and understandingly waive his right to a jury trial before tendering the plea. This issue is not properly before this Court. Unlike subject-matter jurisdiction, which may be raised at any time, a trial court's decision to exercise jurisdiction over a child can only be challenged on direct appeal, not by collateral attack. *In re Hatcher*, 443 Mich 426, 439; 505 NW2d 834 (1993); *In re Powers*, 208 Mich App 582, 587; 528 NW2d 799 (1995). Respondent-father had the opportunity to raise this issue in a direct appeal from the initial dispositional order on January 24, 2008, following the trial court's exercise of jurisdiction. See MCR 3.993(A)(1). Respondent-father failed to challenge the trial court's exercise of jurisdiction in a direct appeal, and may not now collaterally attack the court's exercise of jurisdiction in this appeal by right from the later order terminating his parental rights. *In re Hatcher*, *supra* at 439-444; *In re Gazella*, 264 Mich App 668, 679-680; 692 NW2d 708 (2005). Therefore, we decline to address this issue.

We note that even if this issue were properly before this Court, appellate relief would not be warranted. The record indicates that the trial court had previously acquired jurisdiction over the child pursuant to respondent-mother's plea of admission on January 3, 2008. Because the court's jurisdiction is tied to the child, and the trial court had already acquired jurisdiction over the child pursuant to respondent-mother's plea,[1] it was not necessary to independently establish a basis for jurisdiction with respect to respondent-father. MCR 3.973(A); *In re CR*, 250 Mich App 185, 202; 646 NW2d 506 (2002). Rather, having acquired jurisdiction over the child pursuant to respondent-mother's plea, the court was authorized to enter dispositional orders related to respondent-father, as necessary, in the best interests of the child. MCR 3.973(A); *In re CR*, *supra* at 202. Thus, there is no merit to this issue.

II. Statutory Grounds for Termination

[1] To the extent that respondent-father asserts that respondent-mother also was not properly advised of her right to a jury trial, he does not have standing to raise this issue on behalf of respondent-mother. See *In re Terry*, 240 Mich App 14, 21; 610 NW2d 563 (2000).

In Docket No. 291462, respondent-father argues that the trial court erred in relying principally on his continued marijuana use to find that the statutory grounds for termination were proven by clear and convincing evidence. We disagree.

The petitioner has the burden of proving a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 35o; 612 NW2d 407 (2000). This Court reviews the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(J). A finding of fact is clearly erroneous when the reviewing court has a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

First, we find no merit to respondent-father's reliance on the recently enacted Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, to argue that the trial court's consideration of his continued marijuana use was improper. The MMMA allows for the legal, medical use of marijuana for qualified users as part of a highly regulated scheme. In this case, however, respondent-father's use of marijuana predated the enactment of the MMMA, and there was never any suggestion that respondent-father's use of marijuana was linked to any health problems or medicinal purposes. In sum, there is no basis for concluding that the MMMA has any applicability to this case.

Second, the record indicates that the trial court's decision to terminate respondent-father's parental rights was not based solely on his use of marijuana. Although respondent-father admitted using marijuana, there was evidence of his involvement in other drug-related activities, and he had recently pleaded guilty to possession of crystal methamphetamine. Respondent-father's criminal conduct significantly affected his ability to properly care for the child. Further, respondent-father was offered a treatment plan that was designed to address not only his drug abuse, but also his other deficiencies as a parent, but he failed to comply with the requirements of his plan. Respondent-father's failure to comply with his parent-agency agreement was evidence of his inability to provide proper care and custody of the child for purposes of §§ 19b(3)(c)(*i*) and (g). *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003). Also, the trial court's consideration of the child's age was not improper, inasmuch as §§ 19b(3)(c)(*i*) and (g) both require the court to consider the age of the child in evaluating those statutory grounds. Further, contrary to what respondent-father argues, it was not necessary for the child to have suffered an actual injury in order to prove that termination was warranted under § 19b(3)(j). That subsection only requires a reasonable likelihood that the child will be harmed if returned to the parent's home. Considering respondent-father's criminal history and continued substance abuse, and his failure to address other aspects of his treatment plan, the trial court did not clearly err in finding that this statutory ground was proven.

III. Best Interests

Both respondents argue that the trial court clearly erred in terminating their parental rights, despite the existence of a statutory ground for termination, because the child's best interests would have been better served by establishing a guardianship.

Once a statutory ground for termination is established by clear and convincing evidence, the trial court shall order termination of parental rights if "termination of parental rights is in the child's best interests." MCL 712A.19b(5). Thus, if a trial court affirmatively finds that

termination of parental rights is in the child's best interests, termination is mandatory. *In re Hansen*, ___ Mich App ___; ___ NW2d ___ (Docket No. 289903, issued July 21, 2009), slip op at 2-3. The trial court's best interests decision is also reviewed for clear error. *In re Trejo, supra* at 356-357.

A court may, but is not required to, establish a guardianship with a relative in lieu of terminating parental rights if it is in the child's best interests to do so. *In re McIntyre*, 192 Mich App 47, 52; 480 NW2d 293 (1991); see also MCL 712A.19a(6)(a) and (7)(c). In this case, we find no clear err in the trial court's determination that termination of parental rights, as opposed to a guardianship, was in the child's best interests. The only evidence offered in support of a guardianship came from respondents. Although respondents argued that there was a strong parental bond between them and the child, and that a guardianship was preferable in order to preserve that bond, the existence of this alleged bond was not supported by objective evidence. On the contrary, the child was removed from respondents' home at approximately five months of age, and respondents did not regularly participate in visitations while this matter was pending. Further, about half of the visits that respondents did attend were described as poor because respondents were too tired to meet the child's needs.

Respondent-mother contends that a guardianship will allow her to retain her parental rights while enabling her to receive treatment for her substance abuse problem. However, respondent-mother had failed at several past attempts at treatment, and she refused to follow through with several other opportunities for treatment. Moreover, at the time of the termination hearing, she was due to be incarcerated in jail for several months. Respondent-father's substance abuse problem was not as serious as respondent-mother's, but he was even less involved in visits and the child's care than was respondent-mother.

Under the circumstances, considering the child's age and the little time he had spent in respondents' custody, and the fact that neither respondent reasonably could be expected to be in a position to provide for the child's needs in the foreseeable future, the trial court did not clearly err in finding that termination of respondents' parental rights was in the child's best interests.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra